

Arizona Prosecuting Attorneys' Advisory Council

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ETHICS: The Movie

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ETHICS: The Movie

By
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Legal Advisor

- National Prosecution Standards 22.1
"Prosecution should provide legal advice to the local law enforcement agencies concerning sufficiency of evidence, warrants, and similar matters relating to investigation of criminal cases. . . encourage police to seek this advice as early as possible in the investigation of a case."

Prosecutor Liability

- Absolute Immunity- for initiating a charge, for presenting the prosecution case and for other actions "closely associated with the judicial process."
- Qualified Immunity- objective standard creating liability only where the official violates clearly established statutory or constitutional rights that a reasonable person would have known.

Charging Decision

- *Imbler v. Pachtman*, 424 U.S. 409 (1976):
State prosecutor has "absolute immunity for the initiation and pursuit of a criminal prosecution, including presentation of the state's case at trial."

Advice to Police

- *Burns v. Reed*, 500 U.S. 478 (1991)
Prosecutor had only qualified immunity for advising police on the propriety of hypnotizing the suspect *and* on whether probable cause existed to arrest the suspect.
- Note: The prosecutor enjoyed absolute immunity during a P.C. hearing to obtain a search warrant.

Candor Toward the Tribunal

- A.R.P.C. 3.3 (d)
In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Case Evaluation

- Buckley v. Fitzsimmons, 509 U.S. 259(1993): Recognized that certain actions of a prosecutor were necessarily preliminary to the initiation of prosecution, and were protected by absolute immunity. Such acts include the "professional evaluation of evidence assembled" and appropriate preparation for its presentation *after* a decision to seek an indictment is made.

Absolute Immunity

- Initiation of charges and statements made during the presentation of the case, including claims of presenting false or perjured testimony.
- Prosecution of appeal, habeas etc.
- Retaining the Defendant's property in evidence and/or for civil forfeiture proceedings.

Absolute Immunity

- Bail issues.
- Probable cause hearings and Grand Jury proceedings.
- "Batson" violations.
- Plea bargaining claims.

Qualified Immunity

- Media contact, press releases, and statements.
- Pre-seizure deals of asset forfeiture.
- Investigative activities, interrogations, execution of search warrants, line-ups, videotaping child victims, etc.
- Claims of failure to investigate.

Qualified Immunity

- Legal advise to the police during investigation.
- Investigative activities claimed to constitute coercion of false testimony or fabricated evidence.
- Activities that make the prosecutor a witness.
- Advice to police regarding forcibly drawing blood, etc.

Legal Advisor

- National Prosecution Standards 22.1
"Prosecution should provide legal advice to the local law enforcement agencies concerning sufficiency of evidence, warrants, and similar matters relating to investigation of criminal cases. . . encourage police to seek this advice as early as possible in the investigation of a case."

Charging Decision

- Kalina v. Fletcher, 522 U.S. 118 (1997)
Prosecutor protected by absolute immunity in charging decision including preparation and filing of information and motion for arrest warrant. **BUT** only qualified immunity for executing certification of probable cause since it could be made by any competent witness.

Issue Spotting

- No Miranda warnings
- Police lie about DNA and fingerprints
- Sam asks for a lawyer
- Case already filed in court system
- Confession then advise and tape

Relations with Defendants

- National Prosecution Standards 24.2
". . . prosecutor should make certain that the defendant is treated with honesty, fairness, and full disclosure of his liabilities . . . If legally required, under the circumstances, the prosecutor should advise the defendant of his rights."

Special Responsibilities of the Prosecutor

- A.R.P.C. Rule 3.8
(b) make reasonable efforts to assure the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.

Unrepresented Persons

- A.R.P.C. Rule 4.3
When dealing with an unrepresented person, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer must correct the misunderstanding.

Pretrial Publicity

- A.R.P.C. Rule 3.6
(a) A lawyer participating in the investigation or litigation of a matter "shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

Pretrial Publicity

- "I'm pleased to announce the arrest . . ."
- "Sam Locker has been charged with . . ."
- "Mr. Locker has been positively identified . . ."
- "Mrs. Carter taught school . . . impeccable character"
- "Mr. Locker admitted his involvement . . ."

Pretrial Publicity

- "Mr. Locker named Ben Johansen . . ."
- "Mr. Locker will be entering a guilty plea . . ."
- "First rate investigation . . . confident these two will be convicted."
- "Write it down, this case is a slam dunk."

Special Responsibilities of the Prosecutor

- A.R.P.C. Rule 3.8(f)
except statements "necessary to inform the public of the nature and extent of the prosecutor's action AND that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused . . ."

Special Responsibilities of the Prosecutor

- A.R.P.C. Rule 3.8(f)
AND should exercise reasonable care to prevent investigators, law enforcement, or employees of the prosecutor's office from making statements the prosecutor would be prohibited from making under Rule 3.6 or this rule.

Pretrial Publicity

- "We have arrest warrant for Ben . . ."
- "We request assistance of the public in apprehending the suspect."
- "We will provide a photograph . . ."

Pretrial Publicity

- "Should be considered armed and extremely dangerous."
- "Awaiting crime lab ballistics from a pistol we believe to be the murder weapon."
- "Confident this evidence will help convict Mr. Johansen at trial."

Prior Representation

- A.R.P.C. Rule 1.9

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter . . . whose interests are materially adverse to the interests of the former client, unless with informed consent in writing.

Prior Representation

- A.R.P.C. Rule 1.11(c)

" . . . a lawyer currently serving as a public officer or employee shall not:
(i) Participate in a matter in which the lawyer participated personally and substantially while in private practice. . . "

Prior Representation

- A.R.P.C. Rule 1.11(d)

"As used in this rule, the term 'matter' includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties . . . "

The Brady Rule

- Brady v. Maryland 373 U.S. 83 (1963)
"The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

The Brady Rule

- Evidence must be favorable to the accused;
- The evidence must be possessed by the prosecution team; AND
- The evidence must be material.

Special Responsibilities

- A.R.P.C. Rule 3.8
(d) A prosecutor shall make timely disclosure of all evidence or information known to the prosecutor that tends to negate guilt or mitigate the offense, and for sentencing, disclose to the defense and the tribunal all unprivileged mitigating information known to the prosecutor, unless relieved by a protective order of the tribunal.

Victims' Rights

- A.R.S. 13-4419

A. On request of the victim, the prosecutor shall confer with the victim about the disposition of a criminal offense, including the victim's view about a decision not to proceed with the prosecution, dismissal, plea or sentence negotiations and pretrial diversion programs.

Victim's Rights

A.R.S. 13-4419

C. "The right of the victim to confer with the prosecuting attorney does not include the authority to direct the prosecution of the case."

Victim's Rights

Remember: The right of the victim to confer with the prosecuting attorney does not include the authority to direct the prosecution of the case.

Victim's Rights

Az. Constitution 2.1 Victim's Bill of Rights

* * *

(6) To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.

Plea Negotiation

- Offer + Acceptance = Contract
- If you make an offer put it in writing!
- Santobello v. New York 404 U.S. 257(1971): When a plea "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

Plea Negotiations

- Mabry v. Johnson 467 U.S. 504 (1984): The Court refused to set aside a defendant's guilty plea (to consecutive time) and require enforcement of an "executory agreement" when the deputy prosecutor had made the offer (to concurrent time) by "mistake" and withdrew the offer after the defense attorney called to accept it. The final guilty plea was knowing and voluntary when made.

Competent Counsel

- A.R.P.C. Rule 1.1
"A lawyer shall provide competent representation to a client. Competent representation requires legal knowledge, skill, thoroughness and preparation necessary for the representation."

Misconduct

- National Prosecution Standards 25.5
Prosecutor must take action to substantiate or dispel reasonable suspicion of defense counsel misconduct.
- National Prosecution Standards 25.6
Prosecutor has responsibility to report misconduct by defense counsel to the appropriate authority and to seek sanctions for the conduct.

Reporting Misconduct

- A.R.P.C. Rule 8.3
A lawyer who knows that another lawyer has committed a violation of A.R.P.C. that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority . . .

The No Contact Rule

- A.R.P.C. Rule 4.2
"... a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

Defendant Reinitiates Conversation

- Can the police talk to the defendant?
Arguably yes.
Edwards v. Arizona 451 U.S. 477(1981)
- Can you give the police permission to go talk to the represented defendant?

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The Brady Rule

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- The evidence must be possessed by the prosecution team; AND
- The evidence must be material.

Material

- United States v. Agurs 427 U.S. 97 (1976): "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense. . . if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."

Ex Parte Communication

- A.R.P.C. Rule 3.5
A lawyer shall not:
- (a) seek to influence a judge, juror, etc., by means prohibited by law;
- (b) communicate ex parte with such person during the proceeding unless authorized to do so by law or court order;

Ex Parte Communication

- A.R.P.C. Rule 8.4
(f) It is professional misconduct for a lawyer to knowingly assist a judge to violate the Code of Judicial Conduct or other law.

Witness Interviews

- Interview prior to trial?
- Advise witness not to meet with the defense team?
- Advise witness regarding the law of perjury?
- Advise witness to not appear at the trial?

Fairness to Opposing Counsel

- A.R.P.C. Rule 3.4
"A lawyer shall not:
(a) Unlawfully obstruct another party's access to evidence . . . A lawyer shall not counsel or assist another person to do any such act."

Fairness to Opposing Counsel

- A.R.P.C. Rule 3.4
"A lawyer shall not:
(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."

Witness Preparation

- Explanation of the issues raised in defense motion.
- Explanation of law based on facts.
- Anticipation of defense cross examination.
- Witness recollection differs from lawyer.

Candor Toward the Tribunal

- A.R.P.C. Rule 3.3(a)
"A lawyer shall not knowingly:
(3) Offer evidence that the lawyer knows to be false. . ."

The Brady Rule

- Evidence must be favorable to the accused;
- The evidence must be possessed by the prosecution team; AND
- The evidence must be material.

Duty to Investigate

- National Prosecution Standards 39.1 Recognizes the need for investigators within the prosecutor's office to fulfill the "duty to investigate."
- Do we have to investigate for the defense?
- Who decides if the information is "material"?

The Brady Rule

- Evidence must be favorable to the accused;
- The evidence must be possessed by the prosecution team; AND
- The evidence must be material.

Exculpatory Information

- Giglio v. United States, 405 U.S. 150(1972): When the reliability of a witness may well determine guilt or innocence, nondisclosure of evidence affecting credibility falls within the "Brady" rule.
See also U.S. v. Bagley, 473 U.S. 667 (1985).

Lost Evidence

- Arizona v. Youngblood 488 U.S. 51(1988): Unlike in Brady/Agurs test for clearly exculpatory and material evidence, in cases where evidence is discarded or destroyed, the good/bad faith of the government is entirely relevant, and the accused must show bad faith or ill motive underlying the destruction.

Fairness to Opposing Counsel

- A.R.P.C. Rule 3.4
"A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."

The Brady Rule

- Evidence must be favorable to the accused;
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- The evidence must be material.

Exculpatory Information

- Giglio v. United States, 405 U.S. 150(1972) When the reliability of a witness may well determine guilt or innocence, nondisclosure of evidence affecting credibility falls within the "Brady" rule.
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Brady Information?

- What do we do with this situation?
- Happens often in child sexual abuse or other child witness cases.
- How different is "favorable" or "material" for Brady purposes?

Candor Toward the Tribunal

- A.R.P.C. Rule 3.3
 - (a) A lawyer shall not knowingly:
 - (3) "Offer evidence that the lawyer knows to be false. If a lawyer . . . or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures" including disclosure to the tribunal.

Disclosure of Lie

- Napue v. Illinois 360 U.S. 264 (1959)
"A lie is a lie, no matter what its subject . . ." If in any way relevant, "the D.A. has the responsibility and duty to correct what he knows to be false and elicit the truth . . ."
Citing People v. Savvides 136 N.E.2d 853.

Lawyer as Witness

- always, Always, ALWAYS!!! have somebody with you when meeting with any witness or potential witness in your case!
- A.R.P.C. Rule 3.7
"(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness . . ."

Closing Argument

- National Prosecution Standards 85.1:
"Closing arguments should be characterized by fairness, accuracy, rationality, and a reliance upon the evidence or reasonable inferences drawn therefrom."

Bad Closings

- Use of facts not in evidence
- Right to remain silent
- Calling the defendant names
- Calling jurors by name
- Expressing personal opinion
- Biblical references

Bad Closings

- Message to the community
- Improper use of exhibits
- Request for an attorney
- Appeals to home town favoritism
- Consequences of acquittal
- Appeals to sympathy

Bad Closings

- Comments on objections
- Defining reasonable doubt
- Prayers of guidance
- Reference to excluded evidence
- Facts not in evidence

- "One of the finest offices the public can give to a member of the legal profession in this state is that of Commonwealth's Attorney. Its very status becomes a mantle of power and respect to the wearer. . . No one except the judge himself is under a stricter obligation to see that every defendant receives a fair trial . . ."

Niemeyer v. Commonwealth, 533 S.W.2d 218, 222 (Ky. 1976).
